UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
UNITED STATES AIR FORCE	)	**DOCKET NO.UST-6-98-002-AO-1**
TINKER AIR FORCE BASE,	)	
	)	
	)	
RESPONDENT	)	

ORDER ON RESPONDENT'S MOTIONS TO DISMISS AND FOR ACCELERATED DECISION

The Complaint in this matter was filed on January 13, 1998, by the Director of the Multimedia Planning and Permitting Division for Region VI of the United States Environmental Protection Agency ("EPA" or "Complainant") under the purported authority of Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e, commonly referred to as RCRA.[1] This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. Part 22.

The Complaint charges the United States Air Force, Tinker Air Force Base ("Respondent") with four counts of violating Section 9003 of the Solid Waste Disposal Act, 42 U.S.C. § 6991b, and the Oklahoma Corporation Commission's General Rules and Regulations Governing Underground Storage Tanks. The alleged violations concern Underground Storage Tanks ("USTs") at the Respondent's facility located at 7701 Arnold Street, Tinker Air Force Base, Oklahoma. The Complaint proposes a compliance order, requesting documentation

[1] The Complaint does not specify which subsection(s) of Section 9006 of RCRA provides the EPA's authority in this matter but the Complainant's proposal of the penalty may reasonably be inferred as assessing the penalty pursuant to Section 9006(d) of RCRA.

verifying correction of the alleged violations, and proposes a civil administrative penalty of $96,703 for the alleged violations.

The Respondent filed an Answer to the Complaint on February 11, 1998, responding to the factual allegations in the Complaint, setting forth six affirmative defenses, seeking dismissal of the Complaint, and requesting a hearing. Pursuant to the Prehearing Order dated March 24, 1998, the Complainant filed its prehearing exchange on June 11, 1998, and the Respondent submitted its prehearing exchange on July 10, 1998, and a supplement to its prehearing exchange on September 8, 1998.

With its prehearing exchange, the Respondent filed a Motion to Dismiss Complainant's Administrative Complaint ("Motion to Dismiss") on grounds that this forum lacks jurisdiction to resolve a legal dispute between two Federal agencies and that the Office of the Attorney General is the mandatory forum for resolution of this legal dispute under Executive Order 12146. In the alternative, the Respondent moved for summary judgment ("Motion for Summary Judgment") on the basis that the waiver of sovereign immunity in Section 9007 of RCRA, 42 U.S.C. § 6991f, does not authorize the EPA to impose administrative penalties against Federal facilities.

The Complainant filed a Response in Opposition to Respondent's Motion to Dismiss and in Opposition to Respondent's Motion for Summary Judgment ("Opposition") on July 23, 1998, disputing the Respondent's assertions that this forum lacks jurisdiction over the matter and that summary judgment is warranted.

For the reasons discussed below, the Respondent's Motion to Dismiss will be denied. The Respondent's Motion for Accelerated Decision (Summary Judgment) will be granted.

I. Motion to Dismiss

A. Arguments of the Parties

The Respondent's second and third affirmative defenses, reflected in its Motion to Dismiss, are as follows: that this tribunal lacks jurisdiction over the subject matter of the Complaint; and that the subject matter of the Complaint is not ripe for review.

The Respondent acknowledges that the EPA's Office of General Counsel has declared the EPA's position that it has authority to assess

administrative penalties against another Federal agency for UST violations, presenting as an attachment to its Motion to Dismiss the opinion of the EPA's Office of General Counsel, entitled, "EPA Authority to Assess an Administrative Penalty Against Another Federal Agency Under RCRA Subtitle I," dated June 16, 1998 ("OGC Memorandum"). However, the Respondent presents letters from Robert S. Taylor, Deputy General Counsel of the Department of Defense ("DoD") (Environment & Installations) to Mr. Craig Hooks, Director of the EPA's Federal Facilities Enforcement Office, dated January 20, 1998, and March 18, 1998, expressing the contrary opinion, that the EPA has no such authority. The Respondent's position is reiterated in the April 16, 1999, letter and supporting memorandum from the General Counsel of the DoD to the Department of Justice's Office of Legal Counsel ("DoD Memorandum to OLC"), requesting a legal opinion on this matter.

In its Motion to Dismiss, the Respondent argues that sovereign immunity is a jurisdictional issue in this case and that the Administrative Law Judge cannot resolve disputes about sovereign immunity. According to the Respondent, the United States Attorney General's Office is the mandatory and appropriate forum for resolution of legal disputes between Federal agencies. In support of this argument, the Respondent cites the following provisions of Executive Order 12146:

> 1-401: Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular problem or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
>
> 1-402: Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is a specific statutory vesting of responsibility for a resolution elsewhere.

The Respondent points out that the EPA, in its OGC Memorandum, recognizes that whenever two or more Executive agencies are unable to resolve a legal dispute they are required to

submit the dispute to the Attorney General pursuant to Executive Order 12146. OGC Memorandum, p. 2, footnote 2. Consistent therewith, the EPA in the past has submitted questions to the Department of Justice as to its enforcement authority against Federal agencies. ***See,*** "Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act" (July 16, 1997) ("OLC CAA Memorandum"); "Ability of the Environmental Protection Agency to Sue Another Government Agency," 9 Op. OLC 99 (December 4, 1985). The Respondent believes that the dispute between the EPA and the Respondent over whether penalties can be imposed against the Respondent for UST violations cannot be resolved except by the Attorney General, and must be resolved before the issue of the appropriateness of the penalty can be adjudged. Thus, the Respondent concludes that the Complaint is premature and must be dismissed.

The Respondent asserts that an EPA Administrative Law Judge "cannot adjudicate constitutional issues pertaining to his authority to entertain such suit," citing Harmon Electronics, Inc., 1993 RCRA LEXIS 274 (Order, August 17, 1993) ("an ALJ is generally precluded from passing on the constitutionality of the very procedure he is called upon to administer, in that federal agencies have neither the power nor the competence to pass on the constitutionality of the administrative action"), subsequent Initial Decision (ALJ, December 15, 1994), aff'd, (EAB, March 24, 1997), rev'd, Harmon Industries, Inc. v. Browner, 19 F.Supp.2d 993 (W.D. Mo. 1998), appeal docketed, No. 98-3775 (8th Cir., December 24, 1998); and referring to Social Security Administration v. Nierotko, 327 U.S. 358, 369 (1946) ("[a]n agency may not finally decide the limits of its statutory power.").

The Respondent asserts that an interpretation of a waiver of sovereign immunity is a matter of constitutional law. See United States Department of Energy v. Ohio, 503 U.S. 607, 619 (1992). The Respondent asserts further that administrative venues are not appropriate to resolve questions of constitutional law, and that the Environmental Appeals Board readily recognizes its lack of authority to rule on the constitutionality of a statute. The Respondent urges dismissal of this proceeding on the basis that the Administrative Law Judge cannot proceed unless it has been settled that Congress has waived the Federal Government's immunity from suit in this matter.

Finally, the Respondent argues that proceeding on the merits in this action would violate fiscal law, on the basis of the Purpose Statute providing that appropriations of funds to Federal agencies

"shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a).

In its Opposition, the Complainant contends that the OGC Memorandum clearly establishes the EPA's authority to issue an administrative order to another Federal agency in the same manner it has to issue such order to a private person. In support of this position, the Complainant presents as Complainant's Prehearing Exhibit 13 the OGC Memorandum, which concludes that Congress has clearly stated that the EPA has authority, under Sections 6001(b), 9001(6), 9006(a) and (c), and 9007(a) of RCRA, to assess administrative penalties against Federal agencies in the same manner as against private persons. The Complainant asserts that the Respondent is not being deprived of due process rights contemplated by the Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, as the Respondent will have the right to appeal the Administrative Law Judge's ruling to the Environmental Appeals Board and will have the opportunity to confer with the EPA Administrator before an administrative order becomes effective. According to the Complainant's argument, the Respondent can contest the administrative order within the Executive Branch after exhaustion of the appeals process and the DoD has had the opportunity to confer with the Administrator.

The Complainant maintains that the Administrative Procedure Act empowers Administrative Law Judges and the Environmental Appeals Board with the predisposition to hear and decide cases on their merit whenever possible. See, Jay's Auto Sales, TSCA-III-373 (ALJ, June 5, 1996); Environmental Control Systems, Inc., I.F.&R.-III-432-C (ALJ, July 13, 1993).

In response to the Respondent's argument that the administrative hearing is inappropriate and that Executive Order 12146 requires a mandatory referral to the Department of Justice, the Complainant asserts that no formal mandate exists. In this regard, the Complainant asserts that Executive Order 12146 does not remove jurisdiction from an administrative forum. Finally, the Complainant asserts that a ruling on the Motion to Dismiss at this late stage in the proceeding "would be unfair and prejudicial to Complainant as Complainant has never heard many of these arguments from Respondent, despite regular communication with Respondent." Opposition at 6.

B. Discussion

I - Prejudice

Initially, I address the Complainant's argument that a ruling on the Motion to Dismiss would prejudice the Complainant because the Respondent raised the argument of jurisdiction late in the proceeding. I find no merit to this argument. While the raising of last minute arguments is not encouraged, such is not prohibited. The Complainant has had ample opportunity to respond to the Respondent's argument and there is no element of prejudice or surprise.

II - Third Affirmative Defense - Executive Order 12146

Administrative Law Judges have authority, delegated from the Administrator of the EPA, under Section 9006 of RCRA to conduct a public hearing upon request of a respondent named in a complaint and compliance order. The Respondent, in its Answer, requested a hearing under 40 C.F.R. Part 22, the Rules of Practice. Under the Rules of Practice, the presiding judge has the responsibility to conduct a hearing, inter alia, to "[h]ear and decide questions of facts, law, or discretion." Section 22.04(c)(7) of the Rules of Practice, 40 C.F.R. § 22.04(c)(7). The question of law at the center of this case, and presented in the Respondent's Motion for Summary Judgment, is whether the EPA has authority to assess penalties administratively against another Federal agency for violations of the UST provisions of RCRA. The Respondent believes that this question of law cannot be determined by an Administrative Law Judge, but instead must be addressed by the United States Attorney General.

Although the Department of Defense recently requested the Office of Legal Counsel to provide a formal opinion as to the EPA's authority to assess penalties against Federal agencies for violations of UST regulations (DoD Memorandum to OLC), the Attorney General has not rendered an opinion on this issue. The Assistant Attorney General for the Office of Legal Counsel has been charged with, among other things, "rendering informal opinions and legal advice to the various agencies of the Government." 28 U.S.C. § 510; 28 C.F.R. § 0.25(a). The Justice Department "has a very specific responsibility to determine for itself what [a] statute means, in order to decide when to prosecute." Crandon v. United States, 494 U.S. 152 (1990) (Scalia, J., concurring). Thus, the Attorney General's authority to conduct litigation on behalf of the United States necessarily includes the

exclusive and ultimate authority to determine the position of the United States on the proper interpretation of statutes before the courts." (emphasis added) 1988 OLC LEXIS 44, 12 Op. O.L.C. 89 (June 6, 1988).

Congress has given the EPA the primary responsibility for interpreting RCRA, e.g., through promulgations of regulations and administrative adjudication, although Executive Order 12146 confers on the Attorney General, at the request of appropriate officials, the authority to resolve disputes between Executive agencies. See, "Reconsideration of the Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities," 1994 OLC LEXIS 12 (May 23, 1994) ("We believe that, read together, the Davis-Bacon Act, the Reorganization Plan, 28 U.S.C. §§ 511 and 512, and Executive Order No. 12146, while granting the primary responsibility for interpreting Davis-Bacon to Labor, also confer on the Attorney General, at the request of appropriate officials, the authority to review the general legal principles of the Secretary's decisions under the Act.")

An Administrative Law Judge's ruling in this proceeding on the issue of the EPA's authority to impose on a department of the Federal Government penalties for UST violations is not contrary to President Carter's directive in Executive Order 12146. Such a ruling within the Executive Branch does not preclude the EPA or DoD from seeking an opinion from the Attorney General at the relevant time. First, I observe that an administrative order issued by an Administrative Law Judge against a Federal agency does not become final until the appeal process is exhausted and the agency affected has had the opportunity to confer with the EPA Administrator. Section 6001(b)(2) of RCRA; Section 22.30 of the Rules of Practice, 40 C.F.R. 22.30. Thus, the Administrative Law Judge's order, in itself, does not obtain sufficient finality so as to constitute the point at which the agencies may be deemed "unable to resolve a legal dispute" within the context of paragraph 1-402 of Executive Order 12146.

Second, I observe that Paragraph 1-402 of Executive Order 12146 requires Executive Branch agencies, such as the EPA and DoD,[2] to submit a dispute "prior to proceeding in any court," (emphasis added). A proceeding before an Administrative Law Judge

[2] The Office of Legal Counsel has deemed the head of the EPA to "serve at the pleasure of the President." 9 Op. O.L.C. 119, 1985 OLC LEXIS 42 (December 4, 1985).

generally is not deemed a "court." Baughman v. Bradford Coal Co., 592 F.2d 215, 219 (3d Cir.), cert. denied, 441 U.S. 961 (1979)("generally the word 'court' in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers"). In Baughman, supra at 217, the Third Circuit stated that an "administrative board may be a 'court' if its powers and characteristics make such a classification necessary to achieve statutory goals." Thus, in some contexts, an administrative tribunal may be deemed a "court" if it has the power to accord relief which is the substantial equivalent to that available in federal courts, and if the procedures of the administrative tribunal are comparable to the procedures applicable to federal court suits. Id. (holding that Pennsylvania Environmental Hearing Board is not a "court" within the context of barring citizen suits under Section 304 of the Clean Air Act, because it could not enjoin violators, could impose a maximum penalty of only $10,000, and did not permit intervention as of right); cf. Texans for a Safe Economy Education Fund v. Central Petroleum Corp., 1998 U.S. Dist LEXIS 16146, 28 ELR 21563 (S.D. Tex. 1998) (Texas administrative agency held substantially equivalent to a court for purposes of Section 304 of the Clean Air Act); SPIRG v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131 (3d Cir. 1985) (EPA administrative enforcement action on permit, where there was no authority to impose penalties, did not qualify as court action for purposes of barring citizen suit under Section 505(b)(1)(B) of the Clean Water Act).

In the instant case, the Administrative Law Judge's powers are limited as compared to those accorded a state or federal court under RCRA. In particular, the Administrative Law Judge cannot grant injunctive relief. As such, an administrative tribunal under an Administrative Law Judge within the EPA does not appear to meet the definition of "court" as that term is used in Paragraph 1-402 of Executive Order 12146.

I further observe that in the context of Paragraph 1-402 of Executive Order 12146, the concern appears to be the constitutional problem of justiciability of a suit in an Article III court between two Federal agencies. See, "Ability of the Environmental Protection Agency to Sue Another Government Agency, 9 Op. O.L.C. 119, 1985 OLC LEXIS 42 (December 4, 1985). The Office of Legal Counsel maintains that "the constitutional scheme established by Article II and Article III calls for achieving compliance with RCRA...within the Executive Branch and not in a judicial forum." As the Office of Legal Counsel explains:

> [A] court must . . . assure itself that it is not being asked to decide a question that is properly addressed to the branch of government to which those agencies belong. Where two Executive branch agencies appear on opposing sides of a lawsuit, and where the issue in litigation involves both agencies' obligation to execute the law, the principle of separation of powers makes these inquiries particularly sensitive. Accordingly, the courts must insist that the "real party in interest" challenging the Executive's position in court not itself be an agency of the Executive. If it is, the court is not only faced with a potentially collusive lawsuit, it is also being asked to perform a function committed by the Constitution to the President.

Id.

In an administrative tribunal, however, this Constitutional concern does not arise. The Administrative Law Judge and the administrative tribunal are not part of the Federal judiciary under Article III of the Constitution. The dispute between the two Federal agencies remains within the Executive Branch. As such, there is no violation of the separation of powers principles.

For the foregoing reasons, I find that an EPA enforcement proceeding before an Administrative Law Judge does not fall within the purview of paragraph 1-402 of Executive Order 12146. The Administrative Law Judge's order is not the final EPA administrative order ripe for submission to the Attorney General as the "dispute" between two Federal agencies, and the administrative tribunal is not a "court" as contemplated by Executive Order 12146.

III. Complainant's Opposition - The OGC Memorandum

To establish the EPA's and Administrative Law Judge's jurisdiction over this matter, the Complainant simply relies on the OGC Memorandum, dated July 16, 1998, interpreting RCRA to allow the EPA to assess civil administrative penalties against Federal agencies for UST violations (Complainant's Prehearing Exhibit 13, "OGC Memorandum"). However, the General Counsel's opinion is not binding on the Administrative Law Judge, as it is an intra-agency memorandum from the EPA's General Counsel to the EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, in effect providing support to a party to this case.

Moreover, the EPA's administrative tribunals do not accord deference to statutory or regulatory interpretations advanced by a component of the EPA. Lazarus, Inc., TSCA App. No 95-2, n. 55 (September 30, 1997) ("Parties in cases before the [Environmental Appeals] Board may not ordinarily raise the doctrine of administrative deference as grounds for requiring the Board to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA. This rule applies because the Board serves as the final decisionmaker for the EPA in cases within the Board's jurisdiction"); Mobil Oil Corp., 5 EAD 490, 509 n. 30 (September 29, 1994) ("Because the Board serves as the final decisionmaker for the Agency, the concepts of Chevron and Skidmore deference do not apply to its deliberations."); see also, Environmental Defense Fund, Inc. v Costle, 657 F.2d 275 (D.C. Cir. 1981) (memorandum of EPA General Counsel interpreting a statute does not constitute a formal Agency position).

As to the weight to be accorded to the OGC Memorandum, I note that it was written after the Complaint in this matter was issued. As such, its persuasive authority is diminished. Nordell v. Heckler, 749 F.2d 47, 48 (D.C. Cir. 1984) ("To carry much weight . . . the interpretation must be publicly articulated some time prior to the agency's embroilment in litigation over the disputed provision").

Thus, neither the EPA nor the Attorney General has issued any binding statement as to the EPA's authority to assess civil administrative penalties against Federal agencies under the UST provisions of RCRA. The next question to be addressed is whether the Administrative Law Judge may interpret statutory provisions of RCRA in light of the Respondent's claim that such interpretation involves constitutional law.

IV. Second Affirmative Defense - Administrative forum cannot resolve sovereign immunity issue

The Respondent is correct that questions as to whether or not a provision of a statute or regulation is constitutional cannot be entertained in administrative enforcement proceedings. Public Utilities Commission of California v. United States, 355 U.S. 534, 539 (1958). However, questions as to constitutional applicability of legislation to particular facts may be addressed in administrative enforcement proceedings. McGowan v. Marshall, 604 F.2d 885 n. 18 (5th Cir. 1979); 3 K. Davis, Administrative Law Treatise, § 20.04, at 74 (1958).

In the instant matter, the Administrative Law Judge is being called upon not to address whether particular provisions of a statute are unconstitutional, but to address whether the EPA's application of certain statutory provisions to the context of administrative penalty assessments against Federal facilities is consistent with the Constitution. However, the Office of Legal Counsel, as discussed below, has laid this issue to rest.

The Respondent believes that the issue of sovereign immunity from a suit by the EPA to impose civil administrative penalties against another Federal agency is a constitutional issue. Before such an issue is reached, however, a determination must be made as to whether Congress has stated that the EPA has the authority to impose penalties against Federal facilities for UST violations. See, "Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies," 1994 O.L.C. LEXIS 11 at *7 (May 17, 1994) ("OLC HUD Memorandum") ("The initial question presented is whether the [Fair Housing] Act's government enforcement scheme may be construed to apply to executive branch agencies . . . [i]f we conclude it may not be, then there is no need to resolve the Article II and Article III constitutional issues raised").

If Congress has stated that the EPA has authority to impose penalties against Federal facilities for UST violations, the next question is whether constitutional issues are raised. As to Article III of the Constitution, which limits Article III courts to resolving actual cases and controversies, a constitutional issue arises where the Executive Branch is attempting to sue itself in an Article III court. Another constitutional issue, under Article II, arises where litigation of a dispute between Executive Branch agencies conflicts with the constitutional grant of Executive power to the President to direct and supervise the Executive Branch agencies.

However, these issues need not be decided where no litigation in an Article III court is involved and where the President's power over the Executive Branch is not disturbed. See, OLC HUD Memorandum 1994 OLC LEXIS at *7 ("the sovereign immunity issue . . . would only arise if the judicial enforcement aspect of the enforcement scheme were found applicable."); OLC CAA Memorandum at 3 (separation of powers concerns arise where statute contemplates judicial intervention into an executive branch function, authorizing civil litigation proceedings between federal agencies). The Office of Legal Counsel has stated, "construing a statute to authorize an

executive branch agency to obtain judicial resolution of a dispute with another executive branch agency implicates 'the President's authority under Article II of the Constitution to supervise his subordinates and resolve disputes among them.'" (emphasis added) OLC HUD Memorandum, 1994 OLC LEXIS 11 at *11, quoting "INS Review of Final Order in Employer Sanctions Cases," 13 Op. O.L.C. 446, 447 (1989) (preliminary print). The Office of Legal Counsel also has stated that Article II does not mandate that the President review decisions made in the Executive Branch, as long as he is not deprived of his opportunity to review the matter, as his "subordinates may make decisions pursuant to the statutory duties that Congress has entrusted to their respective offices." "Constitutionality of the Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force," 13 Op. O.L.C. 131, 1989 OLC LEXIS 94 (June 8, 1989) ("OLC NRC Memorandum"). Both Article II and III constitutional issues arise only where judicial enforcement, not administrative enforcement, is concerned.

This proceeding, brought under Section 9006 of RCRA, involves administrative rather than judicial enforcement, and may be resolved fully within the Executive Branch. Congress authorized the EPA to bring administrative enforcement actions in Sections 6001(b) and 9006 of RCRA. Section 6001(b)(2) provides that before any EPA administrative order becomes final, the respondent shall have the opportunity to confer with the Administrator. If not thereby resolved, the dispute may be resolved within the Executive Branch, either by the Department of Justice pursuant to Executive Order 12146, or by the Office of Management and Budget pursuant to Executive Order 12088.[3]

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[3] In the OLC HUD Memorandum, the Office of Legal Counsel noted that another constitutional issue may arise even if the statute were construed to remove from the courts any role in enforcement against Federal agencies: interference with the President's Article II authority would be implicated where a dispute resolution mechanism within the Executive Branch would be determined by Congress. However, for conflicts between Executive Branch agencies as to violations of RCRA, President Carter set up a dispute resolution procedure within the Executive Branch in Executive Order 12088. As to any claim that under Article II a Federal agency may not unilaterally impose civil penalties against another Federal agency, the Office of Legal Counsel has laid such claim to rest: "it is not inconsistent with the Constitution for an executive agency to impose a penalty on another executive agency pursuant to its statutory authority so long as the President is not deprived of his opportunity to review the matter." OLC NRC Memorandum, 1989 OLC LEXIS 94 at *12.

Indeed, RCRA does not provide for judicial review of administrative enforcement orders or for collection of enforcement penalties in Federal court for RCRA violations, unlike the Fair Housing Act addressed in the OLC HUD Memorandum (providing for judicial review), the Atomic Energy Act addressed in the OLC NRC Memorandum (providing for referral to U.S. Attorney General for collection of penalties in Federal district court), and the Clean Air Act addressed in the OLC CAA Memorandum (providing for judicial review and for enforcement or recovery of penalty in Federal district court). See, RCRA §§ 3008, 7006, 9006; but see, Chemical Waste Management v. U.S. EPA, 649 F.Supp. 347 (D. D.C. 1986) (District court reviewed EPA final order assessing penalties under RCRA Section 3008(a), citing to 28 U.S.C. § 1331); United States v. Rogers, 685 F.Supp. 201 (D. Minn. 1987) (Federal district court action to order compliance with terms of Administrative Law Judge's Initial Decision on default, including compliance order and penalty assessment under RCRA § 3008, citing 28 U.S.C. § 1331); Beazer East, Inc. v. U.S. EPA, 963 F.2d 603 (3d Cir. 1992) (Administrative Law Judge's civil penalty assessment and compliance order under RCRA 3008 upheld by EPA Administrator in Final Order, which was held not arbitrary or capricious by district court, and affirmed by Third Circuit). Thus, constitutional issues under Articles II and III are not before me in this proceeding. See, OLC NRC Memorandum, 1989 OLC LEXIS 94 at *25 ("this constitutional issue need not arise, because the framework of the [Atomic Energy] Act clearly permits this dispute over civil penalties to be resolved within the executive branch, and without recourse to the judiciary").

The fact that the Respondent questions the authority of the Administrative Law Judge to entertain the dispute does not prohibit an Administrative Law Judge from ruling on it. Administrative Law Judges may rule on their authority under a statute to adjudicate an issue. CFTC v. Schor, 478 U.S. 833 (1986) (Court upheld Administrative Law Judge's ruling, which was based on long-held agency policy, that he had authority to adjudicate common-law counterclaims).

The cases cited by the Respondent in support of its argument that the Administrative Law Judge cannot address her own authority to entertain this proceeding are unavailing. In Social Security Administration v. Nierotko, 327 U.S. at 369, the Supreme Court stated, "An agency may not finally decide the limits of its statutory power" (emphasis added), which is a judicial function, and concluded that an administrative interpretation of a statute that went beyond

the boundaries of the statute exceeded the permissible limits of administrative interpretation. The opinion did not prohibit an Administrative Law Judge from ruling on such an issue, but merely clarified that such a ruling is not binding on the judiciary. See also, Adams Fruit Co. v. Barrett, 494 U.S. 368, 650 (1990) (agency determinations within the scope of delegated authority are entitled to deference, but an agency may not bootstrap itself into an area where it has no jurisdiction). The passage in the Harmon Electronics opinion, quoted by the Respondent, is followed by the following citations: Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (plain wording of statute alleged to be unconstitutional), Finnerty v. Cowen, 508 F.2d 979 (2d Cir. 1974) (challenge administrative procedures as unconstitutional), and Frost v. Weinberger, 375 F.Supp. 1312, 1320 (E.D. N.Y. 1974) (same). These decisions are not controlling here, as the Respondent is not challenging the EPA's administrative procedures or the plain wording of RCRA as unconstitutional.

In conclusion, I find that there is no persuasive authority that would bar the Administrative Law Judge from addressing the issue of whether the EPA has authority under RCRA to impose penalties administratively against the Respondent, a part of another Federal agency, for alleged violations of the UST provisions.

V. Fiscal law

In its Motion to Dismiss, the Respondent argues that if Congress has not waived the Federal Government's immunity from suit in the instant case, then logically it could not have intended to provide the EPA with funds to prosecute and adjudicate this action. The Respondent characterizes the EPA's pursuit of this action as a violation of "fiscal law." In support of this argument, the Respondent quotes the following language from the Purpose Statute, "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law" (emphasis added). 31 U.S.C. § 1301(a).

First, I point out that under Section 6991i of RCRA Congress specifically authorized appropriations to carry out Subchapter IX of the Solid Waste Disposal Act, Regulation of Underground Storage Tanks. Although the instant order in this matter ultimately finds that the EPA lacks authority to impose punitive penalties against the Respondent for alleged UST violations under RCRA, this finding does not disturb the validity of the EPA's attempt to assert its position. In

other words, the EPA's position is sufficiently arguable to warrant its prosecution. Otherwise, any time a party is contesting the authority or propriety of the underlying cause of action, that party could raise the argument that there never was an intention to fund the prosecution and/or adjudication of the action. Further, I note that there is no cited authority to support the Respondent's argument.

Later, the Respondent, in its DoD Memorandum to OLC, raises the more difficult question of whether Article I of the Constitution or the Purpose Statute prohibits appropriated funds of the Department of Defense from being used for the payment of administrative penalties. In other words, may the President, through the Executive Branch, reallocate funds appropriated in legislation enacted by Congress for a specific purpose, such as operations and maintenance of the military departments, and redirect such funds to the Treasury for the payment of a fine imposed by another Federal agency?

With regard to the Purpose Statute, I note that an exception for the intended use of appropriated funds is permitted "where otherwise provided by law." Thus, where Congress specifically authorizes penalties in a law, such as RCRA, then the exception is met and there is no violation of the Purpose Act.

With regard to the Article I concerns raised by the Respondent, I note that Congress considered the impact of the FFCA resulting from penalties imposed on Federal facilities by the States and the EPA. Congressional criticism of the FFCA focused on the appropriations of the Federal agencies as affected by the authority of the States to assess penalties. See, e.g., 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14901 (daily ed. October 17, 1991) (Remarks of Senator Chafee: "The Bush administration opposed that legislation [FFCA]. In particular, the Departments of Defense and Energy expressed serious concerns that devoting Federal funds to fines and penalties would divert scarce Federal resources away from the most important goal . . . .In addition, those Departments stated their belief that aggressive State attorneys general would disrupt Federal budgets and cleanup priorities by imposing enormous fines and penalties."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 15122, 15128 (daily ed. October 24, 1991) (Remarks of Senator Nunn: "This bill also has a downside potential to create an unproductive situation and undermine the Federal budget process. The ultimate success of this bill will turn on the manner in which this new enforcement authority is used. I hope the States will use the authority judiciously so as to achieve the shared goal of making the Federal facilities a good environmental neighbor."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14900

(daily ed. October 17, 1991) (Remarks of Senator Johnston: "Federal agencies should not be subject to fines and penalties for noncompliance where adequate funding has not been provided by Congress specifically for that purpose."); 101st Cong. 1st Sess., S. Rep. No. 553 (daily ed. October 24, 1990) (Additional views of Senators Chafee, Simpson, Symms, Durenberger and Warner: "The problem is that this bill would subject the United States to fines and penalties for failure to clean up these old sites as quickly as each State or local government official demands that the cleanup be accomplished."); 101st Cong. 1st Sess., 135 Cong. Rec. H 3893, 3925 (daily ed. July 19, 1989) (Remarks of Congressman Lancaster: the FFCA "would give State and local authorities the authority to impose fines and penalties as a means to compel not just compliance . . . but corrective action as well . . . .This bill will permit State and local authorities to accelerate cleanups of hazardous waste sites in a way that will reshuffle defense spending priorities without Congressional approval.")

A review of the relevant legislative history indicates that Congress did not appear particularly troubled by the effect of penalties imposed administratively by the EPA. The Congressional Budget Office reported in a letter dated June 11, 1991, to Congressman John D. Dingell, Chairman of the Committee on Energy and Commerce, that "Penalties imposed by the EPA would be paid through intra-governmental transactions and would have no net budget impact." H.R. Rep. No. 111, 102nd Cong., 1st Sess. (June 13, 1991). Despite the views opposing the FFCA, and in light of the amendment in Section 6001(c) of RCRA limiting the State's use of funds to benefit the environment, Congress decided in enacting the FFCA that the factors supporting the assessment of penalties and fines against Federal facilities outweigh the concerns expressed above.

VI. Conclusion

In view of the foregoing discussion, it is concluded that this tribunal has jurisdiction over the subject matter of the Complaint and that the Administrative Law Judge is not precluded from addressing the Respondent's Motion for Summary Judgment on its merits. Accordingly, the Respondent's Motion to Dismiss is denied.

II. Motion for Summary Judgment

A. Arguments of the Parties

The Respondent's First Affirmative Defense is that the EPA lacks authority to impose punitive civil administrative fines against another Federal agency under Section 9006 or 9007, 42 U.S.C. § 6991e or 6991f. The Respondent asserts that the clear intent of Congress was not to subject Federal agencies to civil or administrative penalties in Section 9007 of RCRA. Conceding that the EPA has administrative enforcement authority under Section 6001(b) of RCRA, the Respondent asserts that there is no grant of authority for the EPA to impose monetary penalties against Federal agencies for violation of the UST provisions in RCRA. Moreover, according to the Respondent, the EPA has not provided the procedural right mandated by RCRA Section 6001(b)(2) to confer with the EPA Administrator before a UST penalty becomes final.

In its Opposition, the Complainant points out that "summary judgment" does not exist as a procedural device in this administrative forum. Assuming that an accelerated decision is requested, the Complainant asserts that genuine issues of material fact exist which would prohibit an accelerated decision. Specifically, the Complainant asserts that a motion for accelerated decision is inappropriate because the Respondent has argued that fact issues as to the penalty amount, appropriateness of the penalty policy, and use of proper guidance are at issue.

In the Complainant's Opposition to the Motion to Dismiss, the Complainant relies on the OGC Memorandum as clearly establishing the EPA's authority to issue an administrative order to another Federal agency in the same manner as it has to issue such order to a private person. Therefore this argument, and the OGC Memorandum, will be taken as the Complainant's substantive opposition to the Respondent's Motion for Summary Judgment.

B. Discussion

I. Accelerated Decision

The Respondent correctly cites Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20, as the authority for its motion for summary judgment, more appropriately referred to as accelerated

decision. The issues of fact as to the amount of penalty are not material to the issues raised in the Respondent's motions. While recognizing that the issues of law presented in the motion for summary judgment are heavily contested and are issues of first impression, such does not render the issues inappropriate for accelerated decision. In fact, the mechanism of accelerated decision provides an excellent means for adjudicating the legal issues presented. Both parties have had ample opportunity to argue and brief their positions. Therefore, the Complainant's assertions as to the Respondent's authority to file a motion for accelerated decision (summary judgment) are not persuasive.

II. Clear statement standard

There is no dispute by either party that the governing standard for determining whether RCRA authorizes the EPA to assess penalties administratively against the Respondent for alleged UST violations minimally is the "clear statement" rule of statutory construction. The clear statement rule is applicable where constitutional concerns are raised. See, OLC CAA Memorandum; OLC HUD Memorandum. The OGC Memorandum states that the "clear statement" standard is appropriate for determining whether a statute authorizes an agency to assess administrative penalties against another agency, based on the Office of Legal Counsel's use of that standard where such a determination potentially raises constitutional issues such as separation of powers concerns. I agree with the Respondent's position that the EPA's interpretation of RCRA authorizing the EPA to assess civil penalties administratively against the Respondent raises separation of powers concerns warranting, at a minimum, the application of the clear statement rule standard.

The finding that the clear statement rule standard is for application here, however, does not mean that the Administrative Law Judge lacks authority to entertain this matter or that the EPA is barred from asserting its authority to assess penalties. As discussed above, the Office of Legal Counsel has concluded that a Federal agency can exercise its administrative enforcement authority against another agency, including the imposition of penalties, consistent with Articles II and III of the Constitution, so long as the President is not deprived of his opportunity to review the matter and the relevant Act does not require either agency to bring a civil action in federal court. See, OLC CAA Memorandum; OLC HUD Memorandum; OLC NRC Memorandum.

In the instant matter, RCRA does not preclude the President from authorizing any process he chooses to resolve the dispute between the EPA and the DoD concerning the assessment of administrative penalties and neither agency is required to bring a civil action. As previously mentioned, RCRA does not provide for judicial review of administrative enforcement orders or for collection of enforcement penalties in federal court for RCRA violations.

Next, I turn to the Respondent's remaining argument, set forth in the DoD Memorandum to OLC, that under cited case law, the doctrine of sovereign immunity can apply to an order by one Federal agency against another that requires payment from that agency's funds. See, United States Department of Energy v. Ohio, 503 U.S. 607, 615 (1992); Department of Army v. F.L.R.A., 56 F.3d 273, rehearing and suggestion for rehearing en banc denied (1995); Franchise Tax Bd. Of California v. U.S. Postal Service, 467 U.S. 512 (1984); In re Newlin, 29 B.R. 781 (E.D. Pa. 1983).[4] The Respondent further suggests that if traditional sovereign immunity analysis is applicable in the interagency setting, then the outcome of the application of the "clear statement" analysis should be no different than the outcome of applying the Supreme Court's presumption that sovereign immunity exists in the absence of an unequivocal expression of congressional intent to the contrary.

It is a common rule that "any waiver of the National Government's sovereign immunity must be unequivocal." U.S. Dep't of Energy v. Ohio, supra; Irwin v. Veterans Administration, 498 U.S. 89, 95 (1990). Congress' expression of waiver must appear on the face of the statute and "it cannot be discerned in (lest it be concocted out of) legislative history." Department of Army v. F.L.R.A., supra at 277 (citing United States v. Nordic Village, 503 U.S. 30, 37 (1992). A waiver of the Federal Government's general immunity from suit, "must be construed strictly in favor of the sovereign" and "not enlarged . . . beyond what the language requires." U.S. Dep't of Energy v. Ohio, supra (citations omitted).

The cases cited by the Respondent in support of its argument that sovereign immunity analysis is applicable in the interagency

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[4] It is noted that in Department of Army v. F.L.R.A., supra, the D.C. Circuit found that the Army enjoyed sovereign immunity unless waived by Congress but there was no finding that the existence of such issue deprived the FLRA of jurisdiction over the matter.

setting are distinguishable from the instant matter. The instant case concerns one Federal agency assessing a penalty against another Federal agency and directly presents the question of "interagency immunity", whereas the Respondent's cited cases concern a Federal agency acting for the benefit of private parties, a state, a governmental corporation, or a court. None of the cited cases is directly on point or controlling here. Regardless of the standard applied, assuming that there is any significant difference between the two standards, it does not change the disposition of the motion for accelerated decision. Thus, this issue is not addressed further.

III. UST Provisions of RCRA

In construing a statute, the question is "whether Congress has directly spoken to the precise question at issue." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-3 (1984). The language of the statute is analyzed first. United States v. Turkette, 452 U.S. 576, 580 (1981). Where statutory language is clear and unambiguous it must ordinarily be regarded as conclusive as there is a strong presumption that Congress expresses its intent through the language it chooses. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n. 12 (1987); North Dakota v. United States, 460 U.S. 300, 312 (1983). Words are to be interpreted as taking their ordinary, contemporary meaning. See, Perrin v. United States, 444 U.S. 37, 42 (1979). Legislative history is examined to determine only whether there is "'clearly expressed legislative intention'" contrary to statutory language, which would require the questioning of the strong presumption that Congress expresses its intent through the language it chooses. United States v. James, 478 U.S. 597, 606 (1986) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

Examination of the governing statutes begins with Subtitle I of RCRA, Subchapter IX of the Solid Waste Disposal Act, entitled "Regulation of Underground Storage Tanks."[5] The underground

[5] It is noted that the EPA cites Section 9006 of RCRA in the Complaint as providing its authority for issuing the Complaint against the Respondent. The EPA, in the OGC Memorandum, cites Sections 6001(b), 9006(a),(c), 9001(6), and 9007(a) of RCRA as the governing statutory provisions in this matter. The EPA, in its Penalty Guidance for Violations of UST Regulations, cites Section 9006(d) of RCRA as providing authority for a Section 9006 compliance order to assess a civil penalty.

storage tank (UST) provisions, found at Sections 9001 through 9009 of RCRA, were added to the Solid Waste Disposal Act by the Hazardous and Solid Waste Amendments of 1984. Pub. L. 98-616, Title VI, 601(a), 98 Stat. 3286; 42 U.S.C. 6991-6991i ("UST provisions"). Section 9006 of RCRA, in pertinent part, provides:

> (a) Compliance Orders
>
> (1) . . . whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time period or the Administrator may commence a civil action in the United States district court in which the violation occurred for appropriate relief . . * * * *
>
> (3) If a violator fails to comply with an order under this subsection within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance.
> * * * *
> (c) Contents of order
> Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.
>
> (d) Civil penalties
> * * * *
> (2) Any owner or operator of an underground storage tank who fails to comply with --
> * * * *
> (B) any requirement or standard of a State program approved pursuant to section 6991c of this title;
> * * * *
> shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation.

Section 9001 of RCRA defines "owner" and "operator" in terms of "any person . . ." and "person" has "the same meaning as provided in Section 6903(15) [the definition of "person" in the general definitions section of RCRA] of this title, except that such term includes . . .

the United States Government." Sections 9001(3), (4), and (6) of RCRA, 42 U.S.C. §§ 9001(3), (4), and (6). Those terms were so defined since RCRA was amended by the Hazardous and Solid Waste Amendments of 1984, inter alia, to add Subchapter IX. Pub. L. 98-616, Title VI, 98 Stat. 3277 (November 8, 1984). At that time, however, the definition of "person" in the general definitions section of RCRA did not include the following phrase, later added by the Federal Facilities Compliance Act of 1992 ("FFCA"): "and shall include each department, agency and instrumentality of the United States." Section 1004(15) of RCRA. Nevertheless, this phrase later added by FFCA is not a significant change in light of the existing express statement of Congress that "for purposes of this subchapter [IX-UST provisions]" the term "person" includes the "United States Government."

The Supreme Court in U.S. Dep't of Energy v. Ohio, supra, at 618, quoted the definition of "person" in RCRA Subchapter IX as an example of a definition that expressly defines that term "for purposes of the entire section in which the term occurs." The "entire section" of RCRA for which "person" is defined includes Sections 9006(a) and (c) of RCRA, which authorizes the EPA to issue compliance orders against "persons," and authorizes the assessment of a penalty in such orders. Similarly, the authority to assess civil penalties against any "owner or operator" under Section 9006(d), by virtue of the definitions of "owner" and "operator," involves the Subchapter IX definition of "person."

Thus, it would appear that since 1984 Congress has allowed administrative penalty assessments against the Federal Government for UST violations. However, also since that time, Section 9006(a) has permitted the EPA to commence an action in federal district court when any "person" is in violation of a UST requirement. An interpretation of Subchapter IX that simply relies upon the definition of "person" as including the Federal Government would authorize the EPA to initiate civil penalty actions in federal court which, as discussed below, would be inconsistent with Congress' apparent intent to limit the EPA's authority to injunctive relief in Section 9007(a). Also, the EPA's authorization to seek penalties in federal court raises substantial separation of powers concerns. Such an interpretation cannot be adopted without further analysis. Before proceeding, however, it is emphasized that no reliance has been placed on the Respondent's observation that the EPA brought no actions for civil administrative penalties against another Federal agency for alleged UST violations before 1997 as such is not

determinative of the question of whether the EPA has had authority to do so.

Since the UST provisions of RCRA were enacted on November 8, 1984, they have included the following waiver of sovereign immunity, at Section 9007(a), which affects the interpretation of "person" as including the Federal Government:

> Federal facilities
> (a) Application of subchapter
> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State of Federal court with respect to the enforcement of any such injunctive relief.

Pub. L. 98-616, Title VI, 98 Stat. 3277 (November 8, 1984).

The general waiver of sovereign immunity for RCRA is in Section 6001 of RCRA. Prior to the FFCA amendments to RCRA in 1992, Section 6001(a) was virtually identical to Section 9007(a).[6] The

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[6] Before the FFCA, Section 6001(a) in Subchapter VI of RCRA provided as follows, in pertinent part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the

Supreme Court held that Section 6001(a) as it existed prior to the FFCA did not waive sovereign immunity from civil punitive fines imposed for past violations of RCRA. U.S. Dep't of Energy v. Ohio, supra. The Court stated that the provision is most reasonably interpreted as "including substantive standards and the [coercive] means for implementing those standards, but excluding punitive measures." Id. at 627-628. The Court noted that the terms "sanction" and "all . . . requirements" may encompass both punitive fines (for past violations) and coercive fines (pending compliance), but do not necessarily imply that punitive fines were intended. Id. at 621, 628. The Court explained that the "statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future." Id. at 628. The Court found such interpretation confirmed by the phrase "sanction . . . with respect to the enforcement of any such injunctive relief," noting that the drafter's only specific reference to an enforcement mechanism describing "sanction" as a coercive means of injunction enforcement bars any inference that punitive fines were intended to be included. Id.

The penalties proposed in the Complaint are for violations alleged to have occurred prior to and on the dates of inspection, April 30 and May 1, 1997. Such proposed penalties are not "coercive" but "punitive." The question is whether Section 9007(a) of RCRA encompasses punitive penalties.

Similar to Section 6001(a) prior to the FFCA, the text of Section 9007(a) of RCRA does not provide any support for finding that Congress intended to encompass the assessment of punitive penalties for past or existing violations in an EPA administrative enforcement action. Further, such lack of Congressional intent is illuminated by the Court's analysis in Dep't of Energy v. Ohio. The text of Section 9006 shows that the EPA may only issue orders, and potentially conduct a hearing thereon, requiring compliance and a penalty if the "person is in violation" of a requirement. Compare, Sections 3008(a) and 11005(a)of RCRA (allowing an order and penalty

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payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.* * * *

assessment for past or current violations) (Section 3008(a) existed before UST provisions enacted and Section 11005(a) enacted after UST provisions). The Section 9007(a) language "shall be subject to and comply with all Federal . . . requirements, both substantive and procedural, in the same manner and to the same extent, as any other person is subject to such requirements . . .," even if construed to encompass sanctions such as penalties, does not necessarily include punitive penalty assessment for past or existing violations of UST requirements under 9006(d), where the language could also encompass coercive penalties under Section 9006(a)(3) for failure to comply with a compliance order.

Moreover, the fact that Congress specified in Section 9007(a) "injunctive relief" and "service charges," but not "penalties," which is referred to in the immediately preceding sections of 9006(c) and (d), provides a strong inference that Congress did not intend to subject the Federal Government to assessment of punitive penalties for past or existing violations under Section 9007(a). This inference is further supported by the fact that the EPA has a choice of issuing a compliance order or commencing a civil action in Federal district court, either of which could include civil penalty assessment. Again, it is noted that serious separation of powers concerns would be raised if the EPA chose to commence a civil penalty action in a Federal court against a Federal agency. Therefore this interpretation is not adopted. See, Jones v. United States, 119 S.Ct. 1215, __ U.S. _ (March 24, 1999) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") These facts also weigh heavily against finding that Congress intended the definition of "person" in Subchapter IX (Subtitle I), which includes the Federal Government, to be the nexus between penalty assessment and enforcement against Federal facilities.

The legislative history of Subchapter IX does not indicate that Congress intended Section 9007(a) to authorize the EPA to assess penalties against Federal facilities for past or existing UST violations (punitive penalties). On March 30, 1984, Senator Durenburger introduced legislation to regulate USTs, which included provisions for Federal enforcement and Federal facilities. Those provisions remained virtually unchanged when they were enacted as Sections 9006 and 9007 of RCRA. See, 98th Cong., 103 Cong. Rec. 7215 - 7218 (March 30, 1984) (Senator Durenburger's introduction of Senate Bill No. 2513 to amend the Safe Drinking Water Act to protect groundwater and prevent leaks from USTs); 98th Cong., 103 Cong.

Rec. 20826-20832 (July 25, 1984) (Senator Durenburger's Amendment No. 3408 to Senate Bill No. 757 to regulate USTs under the Safe Drinking Water Act); 98th Cong., House Conference Report No. 1133, reprinted in 1984 U.S.C.C.A.N. 5649 (Oct. 3, 1984) (Senator Durenburger's proposed UST provisions included in the Hazardous and Solid Waste Amendments of 1984).

The Federal facilities provision introduced by Senator Durenburger appears more limited or restricted than that which existed in the Safe Drinking Water Act, to which he intended to add the UST provisions. 42 U.S.C. § 300j-6(a) (1984), Pub. L. 95-190, 91 Stat. 1396, 1397 (Nov. 16, 1977):

> Each Federal agency . . . shall be subject to , and comply with, all . . . requirements, administrative authorities and process and sanctions . . . in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement . . . and any other requirement whatsoever), (B) to the exercise of any Federal . . . administrative authority, and (C) to any process or sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies . . . No officer, agent or employee of the United States shall be personally liable for any civil penalty under this subchapter . . . .

However, legislative history indicates that Congress was not focused on problems involved with the EPA's enforcement against Federal facilities, as Senator Durenburger remarked in introducing the legislation, "it is our expectation that this [UST] program will be run by the State governments with very little Federal involvement." 103 Cong. Rec. at 7216 (March 30, 1984).

In view of the foregoing, it is concluded that Congress has not expressed an intent in enacting Subchapter IX to subject a Federal agency to assessment of punitive penalties by the EPA for past or existing violations of UST requirements. Therefore, examination of the governing statutory provisions turns to the effect of the Federal facilities provisions found in Subchapter VI of RCRA.

IV. Federal Facilities Subchapter of RCRA

The FFCA amended, inter alia, Subchapter VI of RCRA, entitled Federal Responsibilities. The FFCA was enacted by Congress on October 6, 1992, in direct response to the Court's holding in Dep't of Energy v. Ohio earlier in 1992. The principal amendment was to Section 6001, which provides as follows:

> Application of Federal, State, and local law to Federal facilities
>
> (a) In general
>
> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent or recurring violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). . . . Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.
>
> * * * *
>
> (b) Administrative enforcement actions
>
> (1) The Administrator may commence an administrative enforcement action against any department, agency or instrumentality of the Federal Government pursuant to the enforcement authorities contained in this chapter. The Administrator shall initiate an administrative enforcement

> proceeding against such a department, agency or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person. Any voluntary resolution or settlement of such action shall be set forth in a consent order.
> (2) No administrative order issued to such a department, agency or instrumentality shall become final until such department, agency or instrumentality has had the opportunity to confer with the Administrator.

A basic principle of statutory construction is that the statute should be read as a whole. 2A N. Singer, Sutherland on Statutory Construction § 46.05 (5th ed. 1992). As concluded above, the language of Subchapter IX of RCRA (Subtitle I) does not reveal an intent of Congress to subject the Federal Government to assessment of punitive penalties for past or existing violations of UST provisions of RCRA. The question now is whether Congress intended the FFCA to authorize the EPA to assess penalties for past or existing violations of UST requirements.

Section 6001(a) clearly expresses a waiver of sovereign immunity as to penalties, both coercive and punitive. Such expansive waiver is acknowledged by the DoD in its January 20, 1998, letter to the EPA wherein Mr. Taylor states: "The detailed and explicit language in subsection (a) [of Section 6001] is what is required to provide EPA with the authority to impose civil or administrative penalties and fines on a federal agency..."

However, the application of Section 6001(a) to EPA administrative enforcement actions for violations of Subchapter IX is not apparent.[7] First, I observe that the Complaint does not specifically allege that the Respondent owns or operates a solid waste management facility or disposal site, or that it engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste. There is no allegation that solid or hazardous waste was involved. Second, the EPA places no reliance on the applicability of Section 6001(a). Specifically, it is noted that the

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[7] The EPA in a guidance document entitled "Federal Facilities Compliance Act: Enforcement Authorities Implementation," 58 Fed. Reg. 49044, 49045 (September 21, 1993), Respondent's Prehearing Exchange, Exhibit 6 (EPA Memorandum dated July 6, 1993), cited Section 6001(a) in discussing the EPA's authority to assess penalties, but did not refer to penalties for UST violations. See footnote 11.

OGC Memorandum does not rely on Section 6001(a),[8] and that in the DoD's January 20, 1998, letter to the EPA, the Respondent notes the EPA's cited reliance on Section 6001(b). Moreover, the EPA has not contested or challenged the DoD's statements contained in its January 20, 1998, letter to the EPA that "... the authority in subsection (a) is itself very clearly limited to the 'requirements referred to in this subsection' and those requirements are with respect to the 'control and abatement of solid waste or hazardous waste disposal and management.' The management of product, such as gasoline, other petroleum products, and nonwaste solvents, in underground storage tanks does not fall within the scope of the requirements referred to in subsection (a)." This DoD position is reiterated in the DoD Memorandum to OLC.[9]

Section 6001(b) specifically addresses EPA enforcement actions, authorizing such actions "pursuant to the enforcement authorities contained in this chapter." The "chapter" referenced is Chapter 82 of Title 42 of the U.S. Code, i.e. the Solid Waste Disposal Act in its entirety, as amended, which includes Subchapter IX. Thus, Section 6001(b) applies by its terms to Subchapter IX. Legislative history

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[8] The OGC Memorandum, however, states in a footnote therein: "Because the judicial aspect of RCRA's enforcement scheme does not apply to administrative actions brought by EPA against other Federal agencies, RCRA's waiver of sovereign immunity does not determine the scope of EPA's administrative enforcement authority." OGC Memorandum n. 4.

[9] It is noted, however, that petroleum that is spilled or leaking from a UST is no longer a useful product and is thus deemed a "solid waste." Zands v. Nelson, 779 F. Supp. 1254. 1261-64 (S.D. Cal. 1991); Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co., 878 F.Supp. 1091, 1094-5 (N.D. Ill. 1995); PaineWebber Income Properties Three Limited Partnership v. Mobil Oil Corp., 902 F.Supp. 1514 (M.D. Fla. 1995); Waldschmidt v. Amoco Oil Co., 924 F. Supp. 88 (C.D. Ill. 1996); EPA Proposed Rule preamble, 57 Fed. Reg. 61542 (December 24, 1992). Arguably, the UST requirements for release detection, prevention and corrective action in response to releases could be deemed "requirements . . . respecting the control and abatement of solid waste." Nevertheless, the OGC Memorandum did not rely on Section 6001(a) to provide a clear statement of the EPA's authority in an administrative action to assess penalties against a Federal agency for UST violations. However, this question need not be addressed as the EPA has not raised this argument in its pleadings or response to the motion for summary judgment.

supports this conclusion, as Congressman Eckart, sponsor of the bill H.R. 2194, the "FFCA of 1991" in his remarks in support of the FFCA. 102nd Cong. 1st Sess., 137 Cong. Rec. H 4878, 4883 (daily ed. June 24, 1991) specifically referred to USTs containing petroleum:[10]

> Leaking underground storage tanks . . . cause as much damage whether that gasoline leaked from a Federal government facility or from a neighborhood gas station. Yet, that small business owned on the street corner in anywhere, U.S.A. would be subjected to the harshest environmental penalties this Nation can bring to bear, whereas that same gas pump located at a Federal facility can ignore the Nation's Federal environmental laws. That will end with the passage of this bill. What we are talking about is compliance. We are not talking about the problems that have been suggested by those who will oppose this bill but are simply saying that the Nation's environmental laws which make sense for business and for cities and towns and villages all across the country, that they make sense to us as the Federal Government as well, and that the taxpayer so America should not be financing pollution, and the cost of cleaning up that pollution all at the same time.

See also, 101st Cong. 2nd Sess., 136 Cong. Rec. H 1170, 1199 (daily ed. March 28, 1990) (Remarks of Congressman McMillen as to amending the proposed Department of Environmental Protection Act with the FFCA, referring to a series of USTs that were in danger of leaking).

The Respondent acknowledges that Section 6001(b) reaches Subchapter IX, but it persuasively argues that the EPA's authority to "commence an administrative enforcement action" against a federal agency pursuant to the UST provisions does not provide the EPA with plenary authority to impose a monetary punitive penalty against a federal agency. In support of this position, the Respondent points out that the detailed and explicit language in Section 6001(a), which clearly provides the EPA with the authority to impose civil and

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[10] USTs containing petroleum are regulated under Subchapter IX, whereas USTs containing hazardous waste are regulated under Subchapter III.

administrative penalties and fines, both coercive and punitive, on a federal agency, is not found in Section 6001(b). The Respondent notes that "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972); see also, INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

Aside from the statutory construction of Sections 6001(a) and (b) set forth by the Respondent, it may be argued that if Congress meant Section 6001 to authorize the EPA to assess punitive penalties for UST violations, then Section 9007(a) should have been amended to be consistent with Section 6001.[11] Indeed, on July 13, 1995, House Bill H.R. 2036 introduced in the House by Congressman Oxley to amend land disposal provisions in RCRA, included a proposal to amend Section 9007 to appear virtually identical to RCRA Sections 6001(a) and (b). The portion of the bill to amend Section 9007 did not survive, although other portions of the bill were enacted on March 27, 1996 as the Land Disposal Flexibility Act of 1996, Pub. L. 104-119.

This proposed amendment to Section 9007 reflects Congress' general trend in attempting to make authorities to enforce the environmental statutes against Federal facilities more explicit and broad in scope. See, proposals to amend RCRA to regulate above-ground storage tanks, Senate Bill No. 674, 101st Cong. 1st Sess., 135 Cong. Rec. S 3124 (daily ed. March 17, 1989) (virtually identical to Section 9007) and Senate Bill No. 588, 103rd Cong. 1st Sess., 139 Cong. Rec. S 2925 (daily ed. March 16, 1993) (expressly waiving immunity); proposal to amend the Clean Water Act, H. R. 961, 104th Cong. 1st Sess., 141 Cong. Rec. H 4690 (daily ed. May 10, 1995) (providing that EPA "may commence an administrative enforcement action against any department, agency or instrumentality of the . . . Federal Government pursuant to the enforcement authorities contained in this Act . . . . The amount of any administrative penalty imposed under this subsection shall be determined in

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[11] In addition, a doubt arises in the EPA's early interpretation of the FFCA, by the fact that the EPA issued a guidance document in 1993 to notify all Federal agencies of how the EPA would implement its new enforcement authorities under the FFCA but referred only to enforcement actions under Section 3008 of RCRA and not to actions under Section 9006 of RCRA. Respondent's Prehearing Exchange, Exhibit 6, 58 Fed Reg. 49044 (September 21, 1993).

accordance with section 309(d) of this Act."); amendment to the Safe Drinking Water Act, 42 U.S.C. § 300j-6(b) Pub. L.104-182, 110 Stat. 1660, 1662 (August 6, 1996) (providing that EPA "may issue a penalty order assessing a penalty against the Federal agency."). As to this trend, Congressman Schaeffer remarked:

> Under common law, in order for the federal government to be sued, it must first unequivocally waive its sovereign immunity. . . .The present waiver in Superfund [Section 120] does not meet that test. Although it's clear that Congress meant to waive the government's sovereign immunity, the actual statutory language is inadequate. Consequently, while states can theoretically apply environmental standards to Federal facilities, they often encounter endless litigation . . . and often lose in the end . . . . Anyone who looks at this law would say, why should not Federal facilities have to abide by the same laws as private. And the history shows that Congress wants to fix this inequity. For example, in 1992 I, along with then-representative Eckart . . authored the [FFCA] . . . In 1996 I sponsored similar provisions for the Safe Drinking Water Act amendments, which also became law, waiving the federal government's sovereign immunity . . . . This Congress I have introduced the Federal Facilities Superfund Compliance Act to extend the same waiver of sovereign immunity . . . .

Hearing of Finance and Hazardous Materials Subcommittee of the House Commerce Committee, (September 4, 1997) (available on LEXIS in LEGIS library, HEARINGS file).

Representative Schaeffer's remark reflects the views of several members of Congress that amendments to the Federal facilities provisions of environmental statutes merely clarified Congress' original intent. See, 100th Cong. 1st Sess., 133 Cong. Rec. H 11614 (daily ed. December 17, 1987) (Remarks of Congressman Miller: "clarifying existing waivers"); 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14898, 14902 (daily ed. October 17, 1991) (Remarks of Senator Mitchell: In 1976, when Congress enacted [RCRA], the intention was to waive sovereign immunity so everyone would be treated equally. . . We waived sovereign immunity in 1976. However, some courts have held that Congress has not yet found the magic words to effect such a waiver . . . We are today clarifying what the courts have blurred: that sovereign immunity is completely waived under existing section 6001 of RCRA.") (Remarks of Senator Lautenberg: "Unfortunately some misguided courts and the

administration have concluded that the law creates a double standard. And they have suggested that States can obtain fines and penalties against private parties that violate RCRA, but not against Federal agencies. I think the law is clear on this point. But to assure that courts universally follow the law's original intent, this bill clarifies that principle."); See also, 102nd Cong. 1st Sess., S 14883 (daily ed. October 17, 1991) (Remarks of Senator Baucus).

It may be argued that, inasmuch as Section 6001(b), by its terms, applies to Subchapter IX, further "clarification" of Section 9007(a) is unnecessary to authorize the EPA to initiate administrative enforcement actions against Federal facilities for UST violations. It is reasonable to infer that mere clarification, which was the basis for the FFCA amendments to RCRA, was also the basis for the attempted amendment of Section 9007 in H.R. 2036. However, in order for Congress' intent to waive sovereign immunity for Federal facilities as to UST violations to meet the unequivocal standard set forth by the Court in U.S. Dep't of Energy v. Ohio, or the "clear statement" standard, it would be necessary for Section 9007(a) to be amended.

Finally, I look at the language of Section 6001(b). The terms "administrative enforcement action" and "enforcement authorities" are broad and general terms which may encompass compliance orders, consent orders, corrective action orders, coercive penalties, and punitive penalties for current and past violations. In contrast, Section 6001(a) specifically refers to "punitive fines."

Legislative history of Section 6001(b) does not include many references to "penalties" or "fines," but there are some indications in the conference and Senate reports that Congress may have contemplated that Section 6001(b) authorized the EPA to assess penalties and fines. Next to the language of the statute itself, conference reports, representing the final statement of terms agreed to by both houses of Congress, are the most persuasive evidence of Congressional intent. Davis v. Luckard, 788 F.2d 973, 981 (4th Cir. 1986).

For example, the following passages are excerpted from a Conference Report, 101st Cong., Senate Report 553 (October 24, 1990) and Senate Report, 102nd Cong., Senate Report 67 (May 30, 1991):

> The purpose of the [FFCA] is to make the waiver of sovereign immunity contained in Section 6001 of the Solid Waste Disposal Act clear and unambiguous with regard to the imposition of civil and administrative fines and penalties. * * * *

> [T]he EPA reports difficulties with Federal facility compliance. * * * *
> The ability to impose fines and penalties for violations of the Nation's environmental statutes is an important enforcement tool. As the EPA testified before the Committee, "penalties serve as a valuable deterrent to noncompliance and to help focus facility managers' attention on the importance of compliance with environmental requirements."
> * * * *
> EPA administrative order authority
> The clarification of this authority is necessary because, in the past, other Federal agencies, including DOJ, have disputed EPA's authority to issue administrative orders against other Federal agencies. The Reagan administration sought to invoke the "unitary executive" theory to prevent EPA from issuing administrative orders against other Federal agencies. . . . Accordingly, the language contained in the [FFCA] . . . clarifies existing law, so as to provide the EPA with clear administrative enforcement authority sufficient to ensure Federal facility compliance.

Also, the remarks of some Senators and members of Congress, in legislating the FFCA, indicate that the FFCA possibly authorizes the EPA to assess penalties against Federal facilities.[12] Although "statements by individual legislators should not be given controlling effect . . . at least in instances where they are consistent with the plain language [of the statute], they are 'an authoritative guide to the statute's construction.'" Grove City v. Bell, 465 U.S. 555, 566-67 (1984), quoting, North Haven Board of Education v. Bell, 456 U.S. 512, 527 (1982).

For example, Senator Dodd remarked: "[The FFCA] will clarify EPA's authority to fine and to take administrative enforcement action against Federal facilities that are in violation of hazardous waste requirements." 102 Cong. 1st Sess., 137 Cong. Rec. S 15789 (daily ed. November 1, 1991). Congressman Synar, chairman of

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[12] It is noted that the sponsor of the bill to enact the FFCA, Representative Eckart, emphasized "compliance" rather than specifying authority of EPA to assess penalties in referring to UST violations at Federal facilities , in his remark, "[w]hat we are talking about is compliance," quoted more fully, supra. However, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979).

Subcommittee on Environment, Energy and Natural Resources, remarked, "The Eckart Amendment [FFCA] will end the double standard for hazardous waste regulation where states, municipalities, and private corporations are subject to civil penalties levied by EPA for RCRA violations, but not other agencies of the Federal Government" and Congressman Fazio remarked as follows:

> The Eckart Amendment [FFCA] . . . gives Federal and State regulatory authorities access to all of the compliance and enforcement tools available under RCRA, something they have not had access to in the past. The most important of these tools is the authority to levy penalties and assess civil fines. This has proven to be a critical lever for EPA to induce compliance and deter future misconduct in the private sector and with State and local governments. If we are to encourage greater compliance and improve the management of hazardous waste by our Federal agencies, EPA must also have this authority in its dealings with Federal facilities.

101st Cong. 2nd Sess., 136 Cong. Rec. H 1170, 1198 (daily ed. March 28, 1990).

Before looking further to legislative history, I make two observations. First, the legislators quoted above may have been referring only to solid waste and hazardous waste covered by Section 6001(a) and not the regulation of USTs under Subchapter IX pursuant to Section 6001(b). Second, many of the legislators' comments appear to refer to penalties for noncompliance with compliance orders, which is not at issue in the instant motion. The Respondent accepts that the EPA has administrative enforcement authority over Federal agencies for UST violations under RCRA but maintains that such authority does not encompass monetary punitive penalties for past or existing UST violations.

Other remarks of Senators and members of Congress hint at the EPA's authority to impose penalties in general, but not specifically punitive fines for UST violations. See, 101st Cong. 1st Sess., 135 Cong. Rec. H 3893, 3923 (daily ed. July 19, 1989) (Remarks of Congressman Skaggs: " . . .this is what the Eckart bill [FFCA] would solve. It would give EPA and the States the power Congress originally meant them to have to make sure DOE and other Federal agencies comply with the law. Without the authority to

impose sanctions, that power would be enormously diminished."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 15122, S 15134 (daily ed. October 17, 1991) (Remarks of Senator Durenberger: ". . . my instinct is to give EPA and the States every tool available to force action at these sites."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14899 (daily ed. October 17, 1991) (Remarks of Senator Lieberman: ". . .the EPA has reported difficulties with Federal facility compliance . . . .[W]ithout the threat of penalties for failure to obey the law, an enforcement program collapses."); 102nd Cong. 1st Sess., 137 Cong. Rec. 4748 (daily ed. June 24, 1991) (Remarks of Congressman Richardson: "[The FFCA] would make it clear that Federal facilities are subject to requirements of Federal, State and local government under the Resource, Conservation and Recovery Act, including administrative orders and civil and criminal penalties.")

Clearly, Congress was on notice of the need for the EPA to assess penalties against Federal facilities, not only from the EPA, but also from State governors, who expressed to the Congress the need not only for States, but also for the EPA, to impose penalties. See, H.R. Rep. No. 111, 102nd Cong. 1st Sess.(June 13, 1991) ("It is essential that Congress . . . clarify the waiver of sovereign immunity . . . It is also important to empower the Environmental Protection Agency to collect fines from and impose penalties against Federal facilities.") Congress was also aware of the problem of the EPA suing Federal agencies to enforce compliance with EPA orders in Federal court. See, Letter from Griffin B. Bell, King & Spalding, dated April 5, 1989, to Congressman Ray, reported in 101st Cong. 1st Sess., 135 Cong. Rec. H 3893, 3905 (daily ed. July 19, 1989) ("The proposed legislation [H.R. 1056] would . . . permit the EPA to sue other parts of the Executive Branch to force compliance with EPA orders. I am opposed on both Constitutional and policy grounds to allowing the Executive Branch to sue itself in Federal court.")

Upon examination of the language of the pertinent sections of RCRA discussed above, and considering Congress' intent as expressed in legislative history of those sections, it is concluded that Section 6001(b) of RCRA could be construed as authorizing the EPA to assess penalties in administrative enforcement actions against Federal agencies for existing violations of RCRA's UST requirements. Such plausible construction, however, does not meet the requisite standard requiring a "clear" or "express" statement of Congressional intent authorizing the EPA to administratively assess civil penalties against a Federal agency. Such constrained conclusion does little to assuage the frustration of dealing with the problematic question of separation of powers or accepting the well-established principle of

sovereign immunity especially when applied to the EPA's daunting task of protecting the environment.

Finally, it is noted that this order is distinguishable from the July 16, 1997, opinion of the Office of Legal Counsel concerning the EPA's authority to administratively assess civil penalties against Federal agencies under the Clean Air Act (OLC CAA Memorandum). First, the pertinent statutory text of RCRA and the UST provisions does not provide a strong basis for finding a clear statement of Congressional intent to authorize the EPA to administratively assess punitive civil penalties against Federal agencies for existing UST violations. Second, the relevant legislative history does not adequately support the conclusion that Congress expressed such authority. Third, the Court's opinion in U.S. Dep't of Energy v. Ohio, compelled Congress to have enacted clear and express language that addresses fully the issues and concerns raised by the Court as to the governing RCRA provisions. It is concluded that Sections 6001, 9001, 9006, and 9007 of RCRA do not contain clear and express language of Congress authorizing the EPA to administratively assess punitive penalties against Federal agencies for alleged UST violations under RCRA.

V. Opportunity to Confer with the Administrator

In addition, the Respondent raises the argument that the process for assessing penalties, which is being employed by the EPA to enforce field citations, fails to afford the President a meaningful opportunity to exercise his supervisory authority under Article II of the Constitution. Specifically, the Respondent points out that the EPA has failed to provide the opportunity for Federal agencies to confer with the EPA Administrator before an administrative order or decision becomes final as required by Section 6001(b)(2) of RCRA.

The Rules of Practice, 40 C.F.R. Part 22, provide in the Supplemental Rules governing RCRA, at Section 22.37(g), that a conference with the EPA Administrator may be requested before an order becomes final. However, as correctly pointed out by the Respondent, Section 22.37 governs "all proceedings to assess a civil penalty conducted under section 3008," for hazardous waste violations of RCRA, and thus does not govern proceedings for UST violations under Section 9006 of RCRA.

On February 25, 1998, EPA proposed amendments to the Rules of Practice. 63 Fed. Reg. 9464 (February 25, 1998). Section 22.31, which governs final orders of the Agency, is proposed to include a paragraph (Section 22.31(f)), providing that a final order of the EAB issued to an Federal agency becomes effective thirty (30) days after service unless a conference is requested with the Administrator. This proposed paragraph applies to any proceeding brought under the Part 22 Rules of Practice against a Federal facility, and thus applies to proceedings for alleged violations of UST requirements.

Although the proposed rules have not yet been finalized, it is very likely that they will be published as a final rule and effective before any final order is issued by the EAB in this proceeding. Thus the issue likely will be moot, and at this point in the proceeding is unripe for decision. However, in any event, the EPA has stated its policy in the proposed rule, providing the Respondent with an opportunity to confer with the Administrator before a final order issued by the EPA becomes effective.

ORDER

The Respondent's Motion for Dismissal is Denied.

The Respondent's Motion for Accelerated Decision, requesting judgment that EPA has no statutory authority to impose the proposed administrative penalties against Respondent, is Granted.

Appeal Rights

The Complainant reported in a status report, filed on May 13, 1998, and in its rebuttal prehearing exchange, dated July 23, 1998, that the Respondent has submitted evidence of its compliance with the Compliance Order. Because the Respondent has so complied, this Order disposes of all issues and claims in the above-cited proceeding, and thus constitutes an Initial Decision. See Sections 22.20(b) and 22.27(a) of the Rules of Practice, 40 C.F.R. §§ 22.20(b), 22.27(a). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, an Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within twenty (20) days of service of this Order, or the Environmental Appeals Board elects to review this decision sua sponte.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: 5-19-99
Washington, DC